

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

SUSAN NICOLE STEWART,

Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

No. C03-3061-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING
MAGISTRATE JUDGE’S REPORT
AND RECOMMENDATION**

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I. INTRODUCTION

The plaintiff Susan Stewart (“Stewart”) seeks judicial review of the final decision of the Commissioner of Social Security denying her application for Title XVI Supplemental Security income (“SSI”) benefits. This matter was referred to United States Magistrate Judge Paul A. Zoss. Judge Zoss filed a Report and Recommendation on April 6, 2004. In his Report and Recommendation, Judge Zoss expressed his concern with the Administrative Law Judge (ALJ) finding that Stewart’s past job as a housekeeper could be found to be past relevant work. Further, Judge Zoss found that the ALJ failed to consider all of the relevant facts, failed to conduct a proper credibility analysis, failed to follow the recommendations of disability service examiners to obtain additional tests, failed to obtain Stewart’s treating physician’s opinion, and failed to pose a hypothetical question to the vocational expert that accurately included all of Stewart’s limitations. Judge Zoss recommends that this case be remanded for further development of the record and that the Commissioner be directed to reconsider the evidence and make a proper evaluation of Stewart’s limitations in accordance with the regulations. Stewart filed objections to Judge Zoss’s recommendation and asserts a remand is not necessary because there is enough evidence in the record to support a finding of disability.

II. BACKGROUND

Stewart filed her application on August 1, 2001. She alleges disability due to a combination of a: 1) major depressive disorder, recurrent without psychotic features, 2) social phobia, 3) generalized personality disorder, not otherwise specified, with avoidant, dependent, and borderline traits, 4) degenerative disc disease and degenerative joint disease of the cervical spine, 5) spurring of the lumbar spine, 6) minimal degenerative changes of the knees, 6) headaches, and 7) polyneuropathy with nerve conduction study evidence of

mild carpal tunnel syndrome of the left side. (R. at 15). Her usual weight is 140 pounds but at the time of the hearing she weighed about 220 pounds. Stewart attributed the difference in reported weight to her eating a lot, nervousness, and drinking a lot of pop. (R. at 37).

On May 20, 1998, a prior application for benefits alleging an onset date of October 23, 1998 was filed by Stewart. (R. at 97, 119). On March 1, 1999, this application for benefits was denied. (R. 82). On March 13, 1999, Stewart filed a request for reconsideration of her prior application. (R. at 87). On May 4, 1999, her prior application was denied upon reconsideration. (R. at 89). On May 11, 1999, Stewart requested a hearing before an ALJ. (R. at 93). On March 28, 2000, the ALJ denied Stewart's prior application and no appeal was filed. (R. at 14). The ALJ's decision dated March 28, 2000, remains the final and binding determination of the Commissioner through that date.

On August 1, 2001, Stewart filed her current application for benefits, again alleging an initial onset date of October 23, 1998. (R. at 247-249). Her application was initially denied on December 13, 2001 (R. at 232, 234-238), and again upon reconsideration, on February 25, 2002. (R. at 233, 241-244). On March 5, 2002, Stewart requested a hearing before an ALJ. (R. at 245). A hearing was held on September 13, 2002. (R. at 33-79). On April 3, 2003, the ALJ denied Stewart's application. (R. at 11-21). Stewart filed a request for review by the Appeals Council on April 23, 2003. (R. at 9-10). On June 6, 2003, the Appeals Council denied Stewart's request for review (R. at 7-8), making the ALJ's decision the final decision of the Commissioner. Stewart filed a timely request for review in this court on July 7, 2003. (Doc. No. 3).

On April 6, 2004, Judge Zoss filed his Report and Recommendation. In his Report and Recommendation Judge Zoss noted his concern regarding the ALJ's conclusion that, although Stewart's past part-time work as a housekeeper did not meet the substantial gainful activity level, this work could constitute past relevant work. Judge Zoss found that

the ALJ's finding that Stewart was not credible was not supported by substantial evidence because the ALJ failed to adequately develop the record. Further, Judge Zoss found that the ALJ failed to adequately develop the record before determining Stewart's level of impairment. Because the ALJ had not developed the record prior to determining Stewart's level of impairment, Judge Zoss found that the hypothetical question posed to the vocational expert could not have accurately reflected Stewart's limitations. Therefore, the vocational expert's testimony could not be considered substantial evidence to warrant a finding that Stewart was not disabled. For these reasons, Judge Zoss recommends that this court reverse the Commissioner's decision and remand this case for further proceedings consistent with the Report and Recommendation.

On April 16, 2004, Stewart filed her objections with the court. The court waited to see if the Commissioner would file a reply to Stewart's objections. The court has received no reply and finds the matter is now fully submitted for consideration.

III. LEGAL ANALYSIS

A. Standards of Review

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Goose*, 80 F.3d 298, 306 (8th Cir. 1996) (citing 28 U.S.C. § 636(b)(1)); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)). Stewart has

made specific, timely objections in this case. Therefore, *de novo* review of “those portions of the report or specified proposed findings or recommendations to which objection is made” is required here. *See* 28 U.S.C. § 636(b)(1).

The standard of judicial review for cases involving the denial of social security benefits is based on 42 U.S.C. § 405(g), which provides that “[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive.” This standard of review was explained by the Eighth Circuit Court of Appeals as follows:

Our standard of review is narrow. “We will affirm the ALJ’s findings if supported by substantial evidence on the record as a whole.” *Beckley v. Apfel*, 152 F.3d 1056, 1059 (8th Cir. 1998). “Substantial evidence is less than a preponderance, but is enough that a reasonable mind would find it adequate to support a decision.” *Id.* If, after reviewing the record, the Court finds that it is possible to draw two inconsistent positions from the evidence and one of those positions represents the Commissioner’s findings, the court must affirm the Commissioner’s decision.

See Young v. Apfel, 221 F.3d 1065, 1068 (8th Cir. 2000).

The Eighth Circuit Court of Appeals also has explained, “In reviewing administrative decisions, it is the duty of the Court to evaluate all of the evidence in the record, taking into account whatever in the record fairly detracts from the ALJ’s decision.” *Hutsell v. Massanari*, 259 F.3d 707, 714 (8th Cir. 2001) (quoting *Easter v. Bowen*, 867 F.2d 1128, 1131 (8th Cir. 1989)); *Howard v. Massanari*, 255 F.3d 577, 581 (8th Cir. 2001) (“In assessing the substantiality of the evidence, we must consider evidence that detracts from the Commissioner’s decision as well as evidence that supports it.”) (quoting *Black v. Apfel*, 143 F.3d 383, 385 (8th Cir. 1998), with internal quotations and citations omitted). In this case, the court must determine whether the ALJ conducted a proper analysis, fully developed the record and whether there was substantial evidence on the

record as a whole to support the ALJ's finding that Stewart is not disabled.

B. Stewart's Objections

Stewart objects to Judge Zoss's recommendation that her case be remanded. She specified the parts of the Report and Recommendation to which she objects:

I. The case should not be remanded. Once the Magistrate found the ALJ wrongly assessed Stewart's credibility, it made operative the testimony of the VE that there was no competitive employment Stewart could do.

II. The Commissioner did not carry her burden at step five and there is not substantial evidence to support her finding Stewart is not disabled. She should not be allowed, in this nonadversarial proceeding to go back to hunt for more evidence to defeat Stewart's claim when there is already sufficient evidence in the record to support a finding Stewart is disabled.

(Doc. No. 14).

Summarizing her first objection, Stewart stated that, "The sole objection the Plaintiff has with regard to the Magistrate's Report and Recommendation is that Plaintiff asserts there is sufficient evidence in the record as it now exists to support a determination the Plaintiff is disabled, and there is no need to remand this case for further action by the Administrative Law Judge." (Doc. No. at 2). Stewart states that Judge Zoss is remanding this case back to develop the record with regard to a complete nerve conduction study and to determine the degree of impairment resulting from numbness in her hands and feet. Judge Zoss recommends a remand so further psychiatric evaluations, regarding Stewart's ability to function in the workplace, can be conducted. In addition, Judge Zoss recommends obtaining opinions from Stewart's treating sources regarding her impairment. Stewart asserts that there is no need for further development of the record because if her testimony is viewed as credible, the vocational expert has already found that no work exists

in the national economy which she could do.

Stewart's second objection is that even if the ALJ failed to proceed to step five of the analysis, his failure to do so does not warrant a remand in this case. Stewart asserts that, even though the ALJ failed to proceed to step five, the record shows that when the ALJ set forth a hypothetical question including limitations as testified to by Stewart, the vocational expert indicated that there was no competitive work that Stewart could do. Therefore, Stewart argues, that when the vocational expert was presented with a hypothetical question, correctly setting forth Stewart's limitations, the vocational expert found there was no work existing in the national economy in which Stewart could engage. Stewart contends that the Commissioner's position is not supported by substantial evidence in the record as a whole, that substantial evidence exists to support a finding of disability, that her case warrants an immediate finding of disability and that a remand is not necessary.

C. Discussion

Although courts may enter an immediate finding of disability, it is only if the "record 'overwhelmingly supports' such a finding." *Buckner v. Apfel*, 213 F.3d 1006, 1011 (8th Cir. 2000) (quoting *Thompson v. Sullivan*, 957 F.2d 611, 614 (8th Cir. 1992)). Stewart asserts various reasons why, although she agrees with Judge Zoss's findings, she objects to a remand and asserts that the court can award benefits. The court will now consider Stewart's objections.

The court's review is limited to whether the Commissioner's denial of benefits is supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g). Substantial evidence is evidence that a reasonable mind would find adequate to support the decision of the Commissioner. *Kisling v. Chater*, 105 F.3d 1255, 1257 (8th Cir. 1997). The court must evaluate the evidence in the record that supports the ALJ's decision as well

as that which detracts from it. *Grebenick v. Chater*, 121 F.3d 1193, 1197-98 (8th Cir. 1997). Thus, the court must determine if there was substantial evidence in the record as a whole to support the ALJ's determination that Stewart could perform her past relevant work and/or the additional jobs identified by the ALJ that exist in significant numbers in the national economy.

1. *Issues Relating to Past Relevant Work*

The court will first address the issue of past relevant work. When determining whether a claimant's "past work" is "past relevant work" the ALJ normally will only consider work that meets the following requirements: (1) the claimant performed the work in the prior 15 years; (2) the work lasted long enough for the claimant to learn to do it; and (3) the work was "substantial gainful activity." *See* 20 C.F.R. § 416.965(a); *Terrell v. Apfel*, 147 F.3d 659, 661 (8th Cir. 1998); *Rater v. Chater*, 73 F.3d 796, 798 (8th Cir. 1996); *see also* Social Security Ruling 82-61 (1982). "Substantial gainful activity" is defined by the Social Security regulations as work that "[i]nvolves doing significant and productive or mental duties" and "is done (or is intended) for pay or profit." 20 C.F.R. § 416.910; *see also* 20 C.F.R. § 416.972. Further, the regulations provide guidelines for the ALJ when he is deciding whether the current or past work of a claimant supports a finding that the claimant engaged in substantial gainful activity. One such guideline considers the earnings of a claimant which will ordinarily show whether a claimant has engaged in substantial gainful activity. *See* 20 C.F.R. § 416.974. However, earnings are not the exclusive determinant of substantial gainful activity. The regulations also provide that "work may be substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before." 20 C.F.R. § 416.972(a).¹

¹ The court notes that when claimants receive their letter from the Social Security Administration there is a section that explains substantial work:

In this case, the ALJ began his analysis by presuming that Stewart was not presently engaged in substantial gainful activity. (R. at 15). The ALJ next found that Stewart had severe impairments, but that none of these impairments or combination of impairments met or equaled the impairments listed in the regulations and that her complaints of disabling pain were not credible. (R. at 15). The ALJ discussed Stewart's past work as a housekeeper, stating:

When given the residual functional capacity above, the vocational expert indicated the claimant could perform the duties of the position of housekeeper as she had done in the past. The undersigned agrees, noting it is light and unskilled. Although the claimant did not always realize earnings at a substantial gainful activity level from her work as a housekeeper, this is because she performed this work on a part-time basis much of the time. If her hourly earnings were translated into full-time hours, her earnings would have been at a substantial gainful activity level. Thus, her work as a housekeeper can be considered past relevant work as she has performed the work for long enough to have learned the job, as shown in the work evaluation of the employer.

(R. at 19). The ALJ noted:

[T]he head housekeeper in completing a Work Performance Assessment indicated the claimant had excellent work quality, understanding and carrying out of simple instructions and procedures and complex/detailed instructions and procedures,

Generally, substantial work is physical or mental work you are paid to do. Work can be substantial even if it is part-time. To decide if your work is substantial, we consider the nature of the job duties, the skills and experience you need to do the job, and how much you actually earn.

Usually, we find that your work is substantial if your gross earnings average over \$700 per month after we deduct allowable amounts.

general appearance, and relation to supervisors and good work quantity/pace, good concentration and remaining on task, adapting to changes in the workplace, following rules, using good judgment, relating to co-workers, relating to the public and managing workplace stress, and adequately adhered to schedules including attendance and managing personal stress level in the workplace.

(R. at 19). The record also reveals that the head housekeeper indicated that “towards the end of her employment with us, she was having difficulty in working due to pain” and “[i]f her family problems were not such an issue and if she was not having difficulty with pain, I would consider her for employment.” (R. at 285).

The court notes that Stewart testified she experienced pain when performing the housekeeper job stating:

Q. When you worked at the Comfort Inn, did you have any problems with your, your ability to do that job because of pain?

A. Yes, I did.

Q. What kinds of problems did you have?

A. Well, I had trouble, like I said, doing the job of taking the linen up to the linen room. I had trouble with getting on my knees and trying to scrub the floor, make the beds, just — I had a lot of physical problems.

(R. at 52). The ALJ and Stewart discussed why Stewart believed she could not continue working as a housekeeper.

Q. What about the job at the Comfort Inn? What would keep you from doing that today?

A. I couldn't do any of it that required — I could not do the walking, the bending, the lifting, the carrying.

Q. Now you did that — you had that job recently, though,

isn't that right?

A. Yes, I did.

Q. And you did that job with some pain, is that right?

A. I did it with a lot of pain, yes.

Q. Okay. And did your manager even note that?

A. Yes, she did.

(R. at 67). Although the head housekeeper could have marked "additional break periods" and "easier/lighter duties," or, noted that Stewart's work activity was modified in some manner, when the head housekeeper filled out a work performance assessment no special consideration was noted. (R. at 285). Stewart testified that she worked from June of 2000 to February 2001 with a month or two off in the middle when she did not work. (R. at 46). Stewart filled out a work information form and indicated that she had worked June 2000 to February 2001. (R. at 261). The ALJ asked if it was fair to say she worked as a housekeeper for about six months and Stewart agreed. (R. at 46). However, the head housekeeper's work performance assessment form shows that Stewart was employed as a housekeeper between June 12, 2000 and October 1, 2000. (R. at 284). This form indicates that Stewart worked an average of ten to fifteen hours a week. (R. at 284).

The ALJ included Stewart's housekeeper job as part of her past relevant work. Neither Stewart nor her attorney objected to this during the hearing. The ALJ, vocational expert and Stewart's attorney all agreed to include the housekeeper job as past relevant work:

[ALJ]: Prior to the hearing you prepared the past relevant work summary, which we discussed, and tried to fax over before the hearing. Did you propose any additions to that or changes?

[VE]: No changes. The only addition, under housekeeper, the way the claimant did the job, this housekeeper [job] was light, according to the testimony.

ALJ: Any objection to the admission of Exhibit B18E with that change or addition?

ATTY: And that's essentially 20E with that one change?

ALJ: Yeah, with the addition of the housekeeper job.

ATTY: No, I have no objection to her [including this job].

ALJ: Okay. Any objection to the admission of any of the other numbered exhibits?

ATTY: No, Your Honor.

(R. at 72-73). No objection was made at the time of the hearing and, therefore, the housekeeping job was included as part of Stewart's past relevant work. However, this court finds, after reviewing the record, the ALJ's determination, and Stewart's own testimony that there are inconsistencies in the record as to when and how long Stewart worked as a housekeeper.

In addition, the ALJ stated that "[t]he claimant's past work activity as a housekeeper did not require the performance of work related activities precluded by the [ALJ's residual functional capacity]." (R. at 21). However, then the ALJ recognized that the housekeeper job might not "technically" qualify as past relevant work."

[E]ven if the undersigned [has] found the claimant's work did not technically qualify as past relevant work, and the burden of proof was shifted to the Commissioner, the vocational expert indicated that she could perform the job as described in Exhibit B18E, as well as other jobs existing in significant numbers in the national economy.

(R. at 19). This is an unusual case of an ALJ appearing to define a past job as "past

relevant work” but then deciding that it might not be “past relevant work” and defining the job as “other work.”

The claimant’s impairments did not prevent the claimant from performing work as a housekeeper, whether that job is considered past relevant work or other work that could be performed considering her age, education, and functional limitations. Additional jobs that exist in significant numbers that could be performed by the claimant, per the vocational expert, include small assembler I, route clerk and laundry folder.

(R. at 21). As observed by Judge Zoss it is “improper for the ALJ to extrapolate Stewart’s hourly wage for part-time work into a corresponding full-time job for purposes of deeming the job past relevant work.” (Report and Recommendation, Doc. No. 14 at 37). This court agrees that it is improper for an ALJ to decide that a part-time position rises to the level of past relevant work merely by calculating part-time earnings into full-time earnings. Substantial gainful activity is not based exclusively on earnings when considering part-time work. As previously stated, the regulations provide that “work may be substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before.” 20 C.F.R. § 416.972(a). Additionally, the regulations state:

The ability to work 8 hours a day for 5 days a week is not always required when evaluating an individual’s ability to do past relevant work at step 4 of the sequential evaluation process. Part-time work that was substantial gainful activity, performed within the past 15 years, and lasted long enough for the person to learn to do it constitutes past relevant work, and an individual who retains the RFC to perform such work must be found not disabled.

SSR 96-8p, 1996 WL 374184 at *8 n. 2. The regulations provide that an activity is substantial if it “involves doing significant physical or mental activities,” 20 C.F.R. § 416.972(a). Further, an activity is “gainful” if it is the “kind of work usually done for pay

or profit, whether or not a profit is realized.” 20 C.F.R. 416.972(b). The analysis does not end here. As observed by one court:

The regulations state that the SSA “use[s] several guides to decide whether the work [the claimant has] done shows that [she is] able to do substantial gainful activity,” including the provenance of the claimants’s “earnings.” 20 C.F.R. § 416.974(a).

Melville v. Apfel, 198 F.3d 45, 53 (2nd Cir. 1999). The regulations and social security rulings require an inquiry into Stewart’s ability to do her “past relevant work.” But, Stewart’s past work, especially part-time work, is not relevant unless it was substantial gainful activity.

The ALJ failed to address the fact that the employer’s work assessment form indicates that Stewart worked from June until October, on a part-time basis. This indicates to the court that Stewart worked approximately four months and, if during this time she took off a month, as testified during the hearing, she worked only three months on a part-time basis. The ALJ failed to address the discrepancy in the record between Stewart’s testimony and the work form filled out by Stewart’s employer. The regulations define an unsuccessful work attempt as “work that you are forced to stop after a short time because of your impairment.” 20 C.F.R. §§ 404.1574(a)(1) and 416.974 (a)(1). Social Security Ruling 84-25 states that unsuccessful work attempts “must have ended or have been reduced to the non-SGA level within 3 months due to the impairment or to the removal of special conditions related to the impairment that are essential to the further performance of work.” SSR 84-25, 1984 WL 49799 at *2. Because of the discrepancies in the record, and the inconsistencies in the ALJ’s own decision, the court finds that the record is unclear as to Stewart’s work history as a housekeeper. This court has difficulty believing that an ALJ would find a part-time position lasting for approximately three or four months can equate to substantial gainful activity. The ALJ failed to conduct a proper assessment of Stewart’s past part-time work and on remand is instructed to review the regulations, clarify

the record, and properly consider whether Stewart's part-time housekeeping position can be defined as substantial gainful activity.

As observed by Judge Zoss, "it is troubling" that the ALJ found that "[t]he claimant has not engaged in substantial gainful activity at any time pertinent to this decision," and yet, found that Stewart's impairments did not prevent her from performing work as a housekeeper, whether that job is considered past relevant work or other work. The ALJ cannot find that Stewart has engaged in no substantial gainful activity and then turn around and find that her "past work" is now "past relevant work" when "past relevant work" requires that the work be "substantial gainful activity." The ALJ cannot have his cake and eat it too. The ALJ failed to properly follow the regulations, ignored inconsistencies in the record, and failed to conduct a proper analysis. Therefore, Stewart's objection as to this issue is overruled because, based on this record, the court cannot conclude that Stewart was disabled.

2. *The ALJ's Credibility Analysis*

Stewart argues that the ALJ erred in his determination that she was not credible. Stewart asserts that there is sufficient evidence in the record as it now exists to support a determination that she is disabled and that no remand is necessary. Stewart asserts that Judge Zoss determined that the ALJ was wrong in finding she was not credible with regard to her allegations and that Judge Zoss, in fact, found Stewart was credible. This court does not agree with Stewart's arguments.

Judge Zoss did not find Stewart credible. Judge Zoss found that the ALJ erred in failing to develop the record adequately enough to arrive at a decision regarding Stewart's level of impairment. In other words, the ALJ's determination of credibility was flawed because the record was not developed enough to determine credibility. As stated in Judge Zoss's analysis "[f]inding Stewart's allegations not to be fully credible, the ALJ relied heavily on the opinions of the State agency and other medical consultants, and the level of

treatment Stewart received during the period in question.” (R. at 38). Judge Zoss observed that, although Dr. Raval, Stewart’s treating physician, recommended that Stewart have a detailed EMG and nerve conduction study completed to further evaluate the alleged numbness complained of by Stewart, that these tests were not performed. In addition, instead of requesting the opinions of Stewart’s treating physicians, and/or ordering further tests the ALJ relied on the opinions of consulting physicians. Further, the ALJ was selective when deciding what portions of the consulting physicians’ opinions he would accept. The record indicates that one of the medical experts, who conducted a consultative physical examination of Stewart at the request of the Disability Determination Service, Dr. Stitt, recommended Stewart be evaluated further by a neurosurgeon and an orthopedic specialist as well as a psychiatrist. (R. at 342). This recommendation was not addressed nor mentioned by the ALJ.

After reviewing the record, the court finds that it was improper for the ALJ to determine that Stewart was not credible without further development of the record as recommended by Dr. Raval and Dr. Stitt. Judge Zoss recommends sending this case back to develop the record with regard to a complete nerve conduction study and to determine the degree of impairment resulting from the numbness. Judge Zoss recommends that further neurosurgery and psychiatric testimony regarding Stewart’s ability to function in the workplace be obtained. In addition, Judge Zoss recommends an opinion from Stewart’s treating sources as to her impairments be obtained.

The court agrees with Judge Zoss. The record has not been developed fully and this court cannot find that Stewart should be awarded benefits and, yet, the record does not contain adequate evidence to reach a finding that Stewart should be denied benefits. It is the responsibility of the ALJ to adequately develop the record. (*See Report and Recommendation, Doc. No. 16 at 40-41.*). Even the consulting physician selected by the Disability Determination Services recommended further evaluation. The ALJ failed to do

this. Therefore, Stewart's objection as to this issue is overruled.

3. *Substantial Evidence*

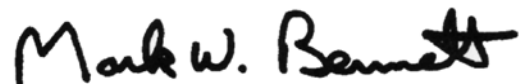
Within the record are inconsistencies. Clarification of those inconsistencies is the responsibility of the ALJ. The ALJ failed to fully develop the record, failed to obtain the opinion of Stewart's treating sources regarding her alleged limitations, failed to follow the recommendation of two physicians and conduct additional evaluations. The vocational expert's testimony, on which the ALJ relies to find that Stewart could do other work, was based on a hypothetical question developed from an inadequate record. Therefore, the vocational expert's testimony cannot be considered substantial evidence to warrant a finding that Stewart is or is not disabled. The court finds that the record, as it presently stands, needs further development. Therefore, Stewart's objection, as to this issue is overruled.

IV. CONCLUSION

Upon *de novo* review of those portions of the Report and Recommendation, or specified proposed findings or recommendations to which Stewart has made objections, *see* 28 U.S.C. § 636(b)(1), the court finds that Stewart's objections must be **overruled**. Therefore, the Report and Recommendation concerning disposition of this matter is **accepted**. 28 U.S.C. § 636(b)(1) ("A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]."). This case is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

DATED this 2nd day of August, 2004.



MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT

NORTHERN DISTRICT OF IOWA